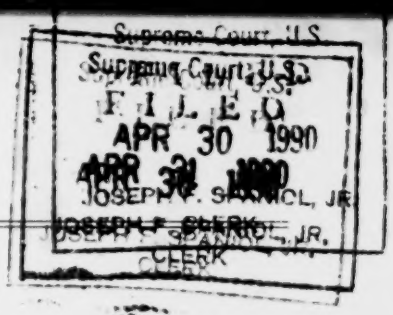

No. 89-1520

In The

Supreme Court of the United States

October Term, 1989

COOK INLET TRIBAL COUNCIL, C.A.A. AND C.M.F.
A TRIBAL INDIAN MOTHER AND
HER MINOR CHILD,

Petitioners,

v.

CATHOLIC SOCIAL SERVICES, INC., C.G. AND S.G.,

Respondents.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS*

Amicus Curiae, the Navajo Nation, joins with Petitioners in urging the Court to grant certiorari in this case. The parties have consented to the filing of this brief as required in this Court's Rule 37. The Navajo Nation is the largest Indian Tribe, with a reservation that spans three states, and with enrolled members residing throughout the United States. Because of their numbers and the mobility of their families, children of the Navajo Nation are involved with state social service workers and state court systems on a daily basis.

The interpretation given to the Indian Child Welfare Act of 1978 (ICWA) by the Alaska Supreme Court seriously impairs the ability of tribes to exercise their rights under the ICWA. If the Alaska Supreme Court decision is allowed to stand, Navajo children found in Alaska, be they domiciliaries of the Navajo Nation or not, may be "voluntarily" placed into foster care or adoptive homes without notice to the Navajo Nation. Without knowledge of state court proceedings, the Nation will be unable to exercise its right to exclusive jurisdiction over domiciliary children, and presumptive jurisdiction over non-domiciliaries. Further, the ICWA's preference scheme for placement of Indian children with extended family members, other tribe members, and finally other Indian families cannot be adhered to without the knowledge and participation of the Navajo Nation.

The Nation fears that other states may follow Alaska's lead, reading denial of certiorari by this Court as an affirmation of Alaska's disregard of the rights of tribes.

For these reasons, the Navajo Nation respectfully requests this Court to accept certiorari, to reverse the decision of the Alaska Supreme Court, and to protect the rights of the Navajo Nation and all other tribes in their children and their future.

REASONS FOR ISSUING THE WRIT

Under the Indian Child Welfare Act of 1978 Indian tribes are entitled to notice of voluntary child custody proceedings involving Indian children as a necessary corollary to their right to intervene in "any State Court proceeding for the foster care placement of, or termination of parental rights to, an Indian child." 25 U.S.C. § 1911. The decision of the Alaska Supreme Court holding that the Cook Inlet Tribal Council had no right to notice of C.M.F.'s case and consequently had no right to intervene, is in direct conflict with the letter of the Act, the Legislative policy behind the Act, and this Court's holding in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___, 109 S.Ct. 1597 (1989).

I. THE DECISION OF THE ALASKA SUPREME COURT UNDERCUTS THIS COURT'S *MISSISSIPPI CHOCTAW* DECISION BY DENYING TRIBES THE RIGHT TO NOTICE OF VOLUNTARY CHILD CUSTODY PROCEEDINGS.

A central premise of this Court's decision in *Mississippi Choctaw* was that Indian tribes have rights and interests protected by the ICWA, and that such rights cannot be defeated by the actions of individuals tribal members.

At the heart of the Act are the tribes' rights to exclusive jurisdiction over children domiciled or residing within their own reservations, and the right to exercise concurrent but "presumptively tribal" jurisdiction over non-domiciliaries. 109 S.Ct. at 1601.

Mississippi Choctaw dealt with the issue of domicile. In recognizing a uniform federal law of domicile, this Court held that a state rule of domicile that would permit parents to avoid the ICWA's jurisdictional scheme would be inconsistent with Congress' intent.[1] 109 S.Ct. 1610.

In the case now before the Court, the Alaska Supreme Court has interpreted the notice provision of § 1912 of the ICWA to preclude intervention of tribes in cases where their Indian children are voluntarily placed in foster care or given up for adoption. Pet. App. at 2a. The Alaska Court's decision can only be viewed as another assault on the jurisdictional scheme established by the ICWA, attempting once again to pit the desires of the parents in individual cases against the concerns of Tribes for stability, longevity, and the welfare of their children. For the reasons cited in *Mississippi Choctaw*, the decisions of the Alaska Supreme Court should be reversed.

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[1] The Court noted with favor the Utah Supreme Court decision *In re Adoption of Halloway*, 732 P.2d 969, 970 (Utah 1986) holding that "[state] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of parents." *Mississippi Choctaw*, 109 S.Ct. at 1610.

II. INDIAN TRIBES ARE ENTITLED TO NOTICE OF INDIAN CHILD CUSTODY PROCEEDINGS BOTH AS SOVEREIGNS AND BECAUSE OF THE SPECIAL RELATIONSHIP THEY HAVE TO THEIR CHILDREN AS *PARENS PATRIAE*.

The decision of the Alaska Supreme Court below effectively sets the cart before the horse in construing the ICWA. Looking first to § 1912, the Court seizes upon the following language to support its position that the Tribal Council had no right to intervene:

> In any involuntary proceeding in a State court, when the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe by registered mail with return receipt requested, of the pending proceedings and of their right of intervention

25 U.S.C. § 1912(a). The Court failed to address how § 1912 could be so interpreted given the explicit right of intervention provided in § 1911(c):

> In *any* State Court proceeding for the foster care placement of, or termination of parental rights to, and Indian child, the Indian custodian of the child and the Indian child's tribe *shall have a right to intervene* at any point in the proceeding.

25 U.S.C. § 1911(c) (emphasis added).

A more coherent approach to construing the Act would be to begin with § 1911, entitled "Indian tribe jurisdiction over Indian child custody proceedings." As this Court recognized in *Mississippi Choctaw*, § 1911 lays

out the dual jurisdictional framework of the ICWA. Sections 1912 and 1913 on the other hand, establish the minimum federal standards and procedural safeguards required in involuntary and voluntary cases respectively. H.R. Rep. No. 1386 at 19, 1978 U.S. Code Cong. & Ad. News 7530, 7541. Not surprisingly, the requirements under § 1912 are more stringent. When a State moves to take custody of an Indian child § 1912 requires the state to notify the parent or Indian custodian and the child's tribe by registered mail, make counsel available to indigent parents, provide access to records and rehabilitative services. 25 U.S.C. §§ 1912(a), (b), (c) and (d). Section 1913, addressing voluntary placements, only attempts to insure that consent was freely given.

The explicit procedural right to certified mail notice mandated in involuntary cases cannot be used to limit the ICWA's broad grant of power to Indian tribes to hear and determine cases involving Indian children. The ICWA allocates power to exercise jurisdiction over Indian children between the states and Indian tribes. It is the embodiment of a federal policy that "where possible, an Indian child should remain in the Indian community", and which "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." H.R. Rep. No. 1386 at 23, 1978 U.S. Code Cong. & Ad. News at 7546.

The ICWA recognizes a dual role for tribes in Indian child custody proceeding. First, Indian tribes are sovereigns with the power to regulate their internal affairs and social relations. This power was judicially acknowledged in *Williams v. Lee*, 358 U.S. 217, 220 (1959), and recognition that decisions affecting Indian children are among those reserved to tribes came with this Court's

holding in *Fisher v. District Court*, 424 U.S. 382, 387-388 (1976).

The ICWA confirmed the exclusive jurisdiction of Indian tribes over children domiciled on the reservation. But Congress also expanded the rights of Indian tribes beyond those previously recognized in case law to allow tribes to exercise jurisdiction over their children wherever they may be found. In doing so the Congress specifically identified Indian children as a tribe's most valuable resource, and premised its authority to enact the ICWA on its trust responsibility for tribes and their resources. *See* 25 U.S.C. § 1901(2) and (3). It would be inconsistent with this trust responsibility to limit ICWA's protection solely to children subject to involuntary state court proceeding. Implicit in the ICWA is the requirement that state courts communicate with tribes regarding Indian foster care and termination of parental rights proceedings so that these precious resources may be preserved.

The second role for a tribe is as *parens patriae* to its children. In this regard it is like any other interested party for whom the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Even if there are reasons for a state to retain jurisdiction in a particular case, the tribe has an interest in seeing that to the fullest extent possible each Indian child will be secure in his right to his Indian heritage, to know he is an Indian and

to live in the Indian way. Acting as *parens patriae* a tribe is entitled to notice under traditional concepts of due process.

Under the Alaska Supreme Court's rationale, the twin infants at issue in *Mississippi Choctaw* could be placed for adoption without notice to the Tribe. Thus, even applying the federal law of domicile recognized by this Court in *Mississippi Choctaw*, and even though the Tribe has exclusive jurisdiction, the Tribe might never know that these children had been born and subsequently lost to the Tribe. Certainly, if the Tribe discovered the existence of these children and their unlawful removal, it could petition a Court of competent jurisdiction pursuant to § 1914 of the ICWA to set aside the adoption order for failure of jurisdiction, but at what cost to the parties involved?

There is no legal basis for withholding information on Indian child placements from the child's tribe. Section 1915(e) of the ICWA requires that each state maintain a record of all Indian child placements, and provide that information to tribes upon request. Theoretically, a diligent tribe could regularly solicit information from states where its children are likely to be found, and then exercise its rights to jurisdiction under § 1911. But surely Congress could not have intended to so burden Indian tribes in the exercise of their rights.

Rather than precluding tribes from being informed of Indian child custody proceedings, the ICWA requires that state courts provide notice to tribes so that there may be a fair and prudent apportionment of the jurisdictional powers allocated in the ICWA.

III. The *Department of Interior Guidelines* Promulgated to Assist the States in Handling Indian Child Custody Proceedings, And Relied on by the Alaska Supreme Court, Conflict With the ICWA.

One of the Congressional findings which precedes the substantive provisions of the ICWA recites that:

> [A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies. . . .

25 U.S.C. § 1901(4). The House Report on the ICWA identifies the Bureau of Indian Affairs (BIA) as a participant in this tragedy because of its long standing practice of sending thousands of Indian children away to boarding schools where they are raised as strangers to their families and their cultural heritage.

> The federal boarding school and dormitory programs also contribute to the destruction of Indian Family and community life.

H.R. Rep. No. 1386 at 9, 1978 U.S. Code Cong. & Ad. News at 7531. Despite the BIA's documented lack of sensitivity to the needs of Indian children, the Secretary of the Interior was charged with drafting regulations to implement the ICWA. 25 U.S.C. § 1952. The *Guidelines for State Courts; Indian Child Custody Proceedings* were published in the Federal Register by the BIA under authority delegated by the Secretary of the Interior and offer no evidence of a change in attitude. 44 Fed. Reg. 67584 (Nov. 25, 1979).

The *Guidelines* provide the foundation for the Alaska Supreme Court's holding that tribes have no right to intervene in voluntary placement cases, and are cited for

that proposition. 44 Fed. Reg. at 67586; Pet. App. at 2a. The position asserted by the BIA in the *Guidelines* has no basis in the law. Instead, the Bureau builds its house of cards on the cornerstone of confidentiality.

The *Guidelines* assert that in a parent's interest of confidentiality, tribes can be denied notice and the right to intervene in voluntary cases. 44 Fed. Reg. at 67586. The Congress in § 1915(c) recognized that there is often a desire for anonymity in adoption proceedings and provided that when a parent consents to placement the Court is required to give weight to such a desire in applying the preferences for placement. Concerns for anonymity may allow a court to bypass family members in favor of other tribal families, or other Indian families, but it does not relieve the Court of its duty to notify the child's tribe of a foster care or termination proceeding, and permit intervention upon petition. The House Report accompanying the ICWA dealt specifically with this issue in its section-by-section analysis providing that "[w]hile the request for anonymity should be given weight in determining if a preference should be applied, it is not meant to outweigh the basic right of the child as an Indian." H.R. Rep. No. 1386 at 24, 1978 U.S. Code Cong. & Ad. News at 7546.

The rationale of the *Guidelines* is seriously flawed and to the extent that it allows the wishes of a parent for anonymity to defeat a tribe's rights under ICWA it has been thoroughly discredited by this court's holding in *Mississippi Choctaw*. The *Guidelines* reflect the same misguided views that necessitated the passage of the ICWA, and should be rejected by this Court.

CONCLUSION

This Court should accept certiorari because the rights of tribes codified in the ICWA and affirmed by this Court in *Mississippi Choctaw* are in jeopardy. If the decision of the Alaska Supreme Court is allowed to stand, and the interpretation given to the ICWA by the BIA *Guidelines* is validated, a single individual will be able to defeat the interests of a tribe in exercising jurisdiction over its children and having a role in their placement by the simple expedient of denying the tribe notice. Clearly this was not the intent of Congress, but this Court's intervention is needed to insure that the biases of courts and agencies which the Act seeks to overcome are not allowed to twist and warp the language of the ICWA so as to make it their own creature.

Respectfully submitted,

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